2000

State of Utah v. Don Brokmeyer : Brief of Appellant

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellee,	* *	Case No. 20000280-CA
vs.	*	
DON BROKMEYER, Defendant/Appellant.	* *	

APPEAL FROM THE RULING DENYING THE DEFENDANT'S SUPPRESSION MOTION BY THE SEVENTH DISTRICT COURT IN AND FOR SAN JUAN COUNTY, STATE OF UTAH THE HONORABLE LYLE R. ANDERSON, PRESIDING

APPELLANT'S OPENING BRIEF

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BRIEF OF APPELLANT

STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to Rule 3 of the Utah Rules of Appellate Procedure because the entry of the judgment on March 20, 2000 is considered to be the final decision of the District Court. See also Utah Code §78-2a-3 (2) (e).

The Notice of Appeal was filed on March 31, 2000, within 30 days of the entry of judgment. Thus, pursuant to Rule 4(a) of the Utah Rules of Appellate Procedure, this appeal is timely.

STATEMENT OF THE ISSUE PRESENTED

The issue presented for review is whether the district court erred in denying Mr. Brokmeyer's suppression motion [R. 9-13]. Legal determinations regarding reasonable suspicion made by the trial court are to be broadly reviewed for

correctness, with the Appellate Court affording a measure of discretion to the trial court in the application of the correctness standard. State v. Chapman, 921 P.2d 446 (Utah 1996); State v. Pena, 869 P.2d 932, 935 (Utah 1994). The factual findings are reviewed under a clearly erroneous standard. State v. Friesen, 988 P.2d 7 (Utah Ct. App. 1999).

DETERMINATIVE LAW

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable case supported by oath or affirmation, particularly describing the place to be searched, and the person or thing to be seized.

Article I, Section 14 of the Constitution of Utah.

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no Warrants shall issue but upon probable case supported by Oath or affirmation, particularly describing the place to be searched, and the person or thing to be seized.

Amendment IV to the Constitution of the United States.

STATEMENT OF THE CASE

A. NATURE OF THE CASE.

Mr. Brokmeyer appeals from his conviction following the entry of his conditional pleas of guilty to Possession of a Controlled Substance, a Third Degree Felony, in violation of Utah Code § 58-37-8 and Expired Registration, a

Class "C" misdemeanor, in violation of Utah Code § 41-1a-1303. Specifically, Mr. Brokmeyer challenges the trial court's denial of his motion to suppress evidence.

B. COURSE OF PROCEEDINGS.

1. On January 19, 2000, Mr. Brokmeyer was charged in a one-count Information with Possession of a Controlled Substance, a Third Degree Felony, in violation of Utah Code § 58-37-8 [R. 1]. The Information was later amended to include two additional counts: No Insurance, a Class "B" Misdemeanor, in violation of Utah Code § 41-12a-302, and Expired Registration, a Class "C" Misdemeanor, in violation of Utah Code § 41-1a-1303 [R. 7-8].

2. On February 17, 2000, both the preliminary hearing and Mr. Brokmeyer's hearing on his pretrial motion to suppress evidence. The suppression motion was denied that same day [R. 28].

3. On March 17, 2000, the trial court entered Mr. Brokmeyer's conditional pleas of guilty to unlawful possession and expired registration. State v. Sery, 758 P.2d 935 (Utah Ct. App. 1988)[R. 28].

C. DISPOSITION IN THE COURT BELOW.

The sentencing was held on March 20, 2000 [R. 22-23]. At that time, the trial court sentenced Mr. Brokmeyer to zero to five years in the Utah State Prison and imposed a fine in the amount of one thousand five-hundred eighty-seven dollars ($1,587.00) [R. 22-23]. The trial court stayed execution of the prison

sentence and placed Mr. Brokmeyer on informal probation to the court for twenty-four (24) months on the conditions that he pay the fine and he violate no Federal, State or Municipal laws [R. 22-23]. The Notice of Appeal was filed timely on March 31, 2000 [R. 25-26].

STATEMENT OF FACTS

In the No Warrant Arrest Fact Sheet, dated January 14, 2000, and attested to by the arresting officer, Deputy Glenn Begay, on January 14, 2000, at 6:21 p.m., Mr. Brokmeyer's vehicle was stopped for no license plate lights [R. 28, pg. 24]. Mr. Brokmeyer's companion, Ms. Manelly, was driving the vehicle [R. 28, pg. 8-9]. Upon approaching the vehicle, Deputy Begay saw marijuana seeds on the driver's floorboard [R. 28, pg. 8-9]. Deputy Begay asked Mr. Brokmeyer if there were any other controlled substances present [R. 28, pg. 16]. Mr. Brokmeyer stated that he had psilocybin in his jacket pocket [R. 28, pg. 16]. Mr. Brokmeyer was arrested [R. 28, pg. 20].

At the preliminary hearing[1], Deputy Begay added that after seeing the marijuana seeds on the floorboard, he noticed a small package of psilocybin in the ashtray [R. 28, pg. 9]. Deputy Begay further testified that while possession of marijuana seeds was, in and of itself, a criminal act he did not seize the seeds [R. 28 pg. 38]. Deputy Begay did not cite Mr. Brokmeyer or Ms. Manelly for

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[1]The testimony at the preliminary hearing was used for the suppression motion [R. 28, pg. 22].

possession of the marijuana seeds, rather, he released the vehicle and the marijuana seeds to Ms. Manelly [R. 28, pg. 38].

With respect to identifying either substance, Deputy Begay was unable to provide much information other than he had seen both illicit substances during his training. When he was asked to describe marijuana with some detail, his response was that the substance would "look like marijuana' or that "it had a look of its own." [R. 28, pg. 25-28]. The deputy was unable to testify how marijuana was ingested. [R. 28, pg. 27]. With respect to marijuana seeds, the deputy testified as follows:

Q. And what do seeds look like?
A. They look like marijuana seeds.
Q. Okay. And can you give me a little bit more of a description in terms of color, size, weight?
A. They're small.
Q. How small?
A. Um, I don't know what ---how much of a dimension of small you want, or ---
Q. Give me another thing that is comparable to it. Is it like a poppy seed? Like a tomato seed? What is it like?
A. It's like a marijuana seed.
Q. But you can't give me any more of a description than that?
A. It's got a look of it's own.
Q. And has [sic] that look?
A. A marijuana seed.
Q. And you can't describe to me any distinct coloring. You can't describe to me any distinct size, shape, anything--anything distinct about marijuana?
A. No.

[R. 28, pg. 29].

The deputy's description of psilocybin was equally lacking: it was "dried" as opposed to "fluid" and that it looked "like the quarter portion of a mushroom on the top part of it" [R. 28, pg. 12-13].

The deputy testified that he received training to include all of the important and significant facts in his arrest reports [R. 28, pg. 33]. He testified that he was also taught to be thorough in his reports [R. 28, pg. 34].

SUMMARY OF ARGUMENT

It is well established that a detention is constitutionally permissible only where (1) the officer's action was reasonably justified at its inception and (2) "the resulting detention was reasonably related in scope to the circumstances that justified the interference in the first place." State v. Lopez, 873 P.2d 1127, 1131-32 (Utah 1994)(quoting Terry v. Ohio, 392 U.S. 1, 19-20, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

Deputy Begay's stop of the vehicle due to a minor equipment was constitutionally permissible. The 'resulting detention' was not 'reasonably related in scope to the circumstances that justified the interference in the first place'.

The deputy initially justifies expanding the stop on the basis that he saw marijuana seeds. Yet, he was unable to describe a marijuana seed. In addition, although the deputy concedes that possession of the seeds is illegal, he allows the driver to continue on her way with the seeds in her possession.

In his initial report, the deputy indicated that when he asked about additional controlled substances, Mr. Brokmeyer admitted possessing psilocybin. There was absolutely no indication that the deputy saw the psilocybin prior to expanding the scope. When the deputy testified, however, he justified his actions based, in part, on the psilocybin in the ashtray. Similar to the marijuana seeds, he was unable to give much of a description of the psilocybin. Thus, under the circumstances, the trial court erred in finding the scope of the stop justified.

ARGUMENT

THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRESS

A. WITHOUT CORROBORATION OF DEPUTY BEGAY'S CLAIM THAT HE SAW MARIJUANA SEEDS, THE SEARCH SHOULD BE HELD INVALID.

In Utah v. Maycock, 947 P.2d 695 (Utah Ct. App. 1997), this Court addressed the issue of corroboration. There, the officer justified expanding the stop based on the smell of burnt marijuana. No marijuana was found during the search. This Court held that a search based on an officer's purely subjective belief that there was an odor of burnt marijuana must be corroborated by finding evidence of either the substance or its use.

Here, while the trial court did address the Maycock case, it failed to take into account the reasoning underlying the holding. Instead, the trial court simply concluded that Maycock was inapplicable because it dealt with the issue of smell

as opposed to sight.

The trial court essentially relied on the 'plain view' doctrine. See generally, State v. Romero, 660 P.2d 715, 718 (Utah 1983)(setting forth a three-prong test for the plain view exception: (1) lawful presence of the trooper; (2) evidence in plain view and (3) clearly incriminating). Such reliance is misplaced given Deputy Begay was unable to specifically describe a marijuana seed.

Moreover, the trial court failed to take into account the reasoning underlying the decision of Maycock:

> If this were a case of an alert by a trained drug sniffing dog with a good record, we would not require corroboration to establish probable cause. The dog would have no reason to make a false alert. But for a human sniffer, *an officer with an incentive to find evidence of illegal activities and to justify his actions when he searched without consent, we believe constitutional rights are endangered if limitations are not imposed.*

Id. citing, States v. Nielsen, 9 F.3d 1487 (10th Cir. 1993)(emphasis added).

In the case at hand, the deputy, by virtue of being a law enforcement officer, has an incentive to find evidence of illegal activities. That he was later unable to describe a marijuana seed shows that his initial identification is little more than a hunch. That his hunch turned out right makes no difference, because it is clear the search must be justified at its inception.

That an assumption is insufficient is illustrated in the case of Friesen.

There, the officer assumed that under Wyoming law, a motorist was required to have both the front and rear license plates. Based on that assumption, the officer initiated a traffic stop. This Court rejected that assumption as sufficient justification, stating:

> To enforce the law, an officer must know what the law is and what it prohibits . . . The trooper in this instance did not have a reasonable articulable suspicion of criminal activity when he stopped Friesen. The only articulable and specific fact known to him when he stopped Friesen was that Friesen's car had only a rear plate and that some states require vehicles to display front license plates. Having no specific knowledge about Wyoming's licensing requirements, he made the decision to stop Friesen only because he presumed that Friesen violated Wyoming's motor vehicle law, and that such a violation might be an indicator of other, possibly more serious, offenses as well.

Id. at p.11.

Here, Deputy Begay did not have a reasonable articulable suspicion of criminal activity when he questioned the Mr. Brokmeyer and his companion about the marijuana seeds and the presence of other controlled substances. The only articulable and specific fact known to him when he made the stop was that there was a minor equipment violation. Having no specific knowledge about marijuana seeds, other than they are 'small', or that they have a 'look of their own', is an insufficient basis for the deputy to justify expanding the scope of the stop.

B. DEPUTY BEGAY'S CLAIM THAT HE SAW PSILOCYBIN SHOULD BE DISREGARDED.

Shortly after the arrest, Deputy Begay filled out a No Warrant Arrest Fact Sheet. In that written report, he indicated that the basis for expanding the stop and conducting the search was the presence of marijuana seeds. He then questioned the occupants about other controlled substances. Mr. Brokmeyer replied that he possessed psilocybin.

At the hearing, Deputy Begay testified that he saw the psilocybin in the ashtray before questioning the occupants about other controlled substances. This later justification should be rejected for a number of reasons. First, given the deputy's inability to specifically describe psilocybin, it stands to reason that the only way that he knew that the substance was psilocybin was based on Mr. Brokmeyer's admission. Like the marijuana seeds, it defies common sense that the deputy would be able to recognize the substance yet not be able to offer a description of it.

In addition, the lack of any information about the psilocybin in the arrest report renders his later testimony suspect. Even though the deputy testified that he was trained to include all significant and material facts in his reports, no mention is made of the psilocybin until the hearing. This is little more than hindsight reconstruction. Friesen, *supra* at pg. 12(the justification must take

place at the time of the stop).

It is clear that Terry and its progeny require that widening the scope of the stop is based on a reasonable suspicion that criminal activity is afoot. Here, the officer stops the vehicle for an equipment violation. There is no question that he was entitled to do so. The problem begins when Deputy Begay starts questioning the occupants about controlled substances. He impermissibly widened the scope of the stop. Accordingly, any evidence seized thereafter should be suppressed as 'fruits' of the poisonous tree. See Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

CONCLUSION

Based on the foregoing, the Defendant/Appellant respectfully requests that this Court reverse the trial court's denial the Motion to Suppress.

DATED this 13th day of July, 2000.

Respectfully submitted:

ROSALIE REILLY
Attorney for Defendant/Appellant

CERTIFICATE OF SERVICE

I hereby certify that I have mailed, by first-class mail, postage prepaid, two accurate copies of the foregoing Brief of Appellant to the Office of the Attorney General, Appeals Division, 160 East 300 South, 6th Floor, Salt Lake City, Utah 84114 this 13th day of July, 2000.

ROSALIE REILLY